In the Matter of:	:	
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THE MATCH INSTITUTION,	:	HUDBCA No. 87-1850-C2
	:	
Appellant	:	
	:	
Contract Nos. HC-10469 & HC-5621	:	

For the Appellant:

Pauline A. Schneider, Esq.
Hunton & Williams
2000 Pennsylvania Avenue, N.W.
Suite 9000
P. 0. Box 19230
Washington, D. C. 20036

For the Government:

Bruce Kasson, Esq.
Office of General Counsel
Department of Housing and
Urban Development
Washington, D. C. 20410

DECISION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

May 17, 1991

Statement of the Case

This is an appeal by The MATCH Institution ("MATCH") from a final written decision of a contracting officer of the U.S. Department of Housing and Urban Development ("HUD `I, "Government" or "Department") dated July 23, 1986, reclassifying certain costs and disallowing other costs incurred in the performance of Contract Nos. HC-10469 and HC-5621. The appeal was taken pursuant to the Disputes clauses of the two contracts and the Contract Disputes Act of 1978, as amended, 41 U.S.C. S 601 et seq.

Although this case was docketed on October 22, 1986, its proceedings were extended upon motion of counsel and by a series of unsuccessful settlement negotiations. Subsequently, MATCH filed a Motion for Decision on Pleadings, citing, generally, its disagreement with the amount of fees allowed and disallowed, and with the cost principles applied by the contracting officer in making his decisions on MATCH's claims. The motion stated that MATCH has ceased operations, has no income, has de minimis assets, and that its chairman is employed primarily overseas. It, therefore, requested a judgment from the Board on the "prior pleadings and record as it stands" consistent with Rule 11 at 24 C.F.R. § 20.10. The Government did not oppose MATCH's request. An opportunity was given to the parties to file briefs and supplemental evidence, but none were filed.

Findings of Fact

1. MATCH was a for-profit corporation organized in the District of Columbia in 1971. It had a mix of private sector and Government contracts, including contracts from the U.S. Departments of Transportation, Commerce, and Agriculture, and from the Small Business Administration and Agency for International Development. Its private sector business included both domestic and international work. (Appeal File ("AF") Tabs 2A, 2B, 4B.)

2. On July 16, 1982, MATCH was awarded a cost-plus-fixed fee contract, Contract No. HC-10469, by HUD for the purpose of initiating and promoting rental rehabilitation programs by state and local governments. The effective date of the contract was July 30, 1982. The original cost ceiling of $600,000 was increased to $799,531 by Modification 1. The contract performance period was extended to March 31, 1984 by Modification 2. (Complaint; Answer; AF Tab 2A.)

3. On June 13, 1983, MATCH was awarded Contract No. HC-5621 by HUD for the purpose of designing a minority youth training and employment program for implementation at public housing agencies. The contract was a cost-plus-fixed fee contract, in an amount not to exceed $513,006. The contract performance period was from June 13, 1983 to March 30, 1984, as extended by modification. (Complaint; Answer; AF Tab 2B.)

4. After completion of performance on both contracts, the HUD Office of Inspector General ("OIG") audited the two contracts and issued audit reports dated August 8, 1984, and July 2, 1985. These reports, in general, found that MATCH had been overpaid on the two contracts. Through various letters to the contracting officer, MATCH objected to the findings of the audit reports and requested that the contracting officer reconsider the conclusions of the audit reports. On July 23, 1986, the contracting officer issued a final written decision on allowable costs and fees payable under the contracts, based on the audit reports and MATCH's responses to them. (Complaint; Answer; AF Tabs 3B, 3E, 3M, 30, 3P, 3Q, 4B, 4C, 4F, and 1.)

5. The final written decision of the contracting officer stated that MATCH owed HUD $34,868 on Contract No. HC-10469 and $5,639 on Contract No. HC-5621, for overbillings in excess of actual costs incurred for fiscal years 1983 and 1984. MATCH repaid HUD $5,639 for the overbillings on Contract No. HC-5621 on June 25, 1986. MATCH does not dispute the $34,868 in overbillings on contract No. HC-10469, but has not repaid HUD for them. The contracting officer also disallowed an additional $1,344 in costs on Contract No. HC-10469 and $64,442 on Contract No. HC-5621. The categories of, and stated reasons for, the disallowances were as follows:

a. Reclassification of all claimed direct and overhead labor costs for the MATCH Chairman to general and administrative costs ("G&A"), reducing direct labor charges for fiscal years 1983 and 1984 by $18,244 on Contract No. HC-5621. The contracting officer questioned the validity of the MATCH Chairman's direct labor hours because of repetitive time allocation patterns on the time sheets, unspecified travel allocations, and omissions of non-Federal and unrelated Federal activities from the time sheets. The contracting officer also relied on the fact that the MATCH Chairman told the OIG auditors that his timesheets were based on projections, rather than the actual time he worked.

b. Disallowance of all hours worked by the MATCH Chairman in excess of the "standard 2,080 hours work year" as inadequately supported by questionable timesheets; inconsistent with MATCH policy and practice, unapproved by HUD, and excessive and unreasonable.

c. Reclassification of $85,303 from the overhead and G&A pools for the contracts to MATCH's International Division cost pool relating to the salary of an employee in the International Division, selling expenses related to joint ventures and export brokering, and legal expenses for a business venture in Nigeria.

d. Disallowance of a $200 reimbursement to a MATCH employee for purposes of liquor and pastries for a company party in FY 1983.

e. Disallowance of a $660 penalty charge for late payment of real estate taxes on FY 1983.

f. Disallowance of a $150 payment to the Howard University Chapter of Phi Beta Kappa.

g. Disallowance of $750 paid to the National Conference of Black Lawyers and the TransAfrica Committee in Fiscal Year 1984.

h. Reclassification from fringe benefits (indirect costs) to direct costs $25,863 paid to MATCH employees in fiscal years 1983 and 1984 as bonus and cost-of-living increases because the payments did not meet requirements for classification as bonuses and cost-of-living increases.

i. Disallowance of cost items for lack of adequate supporting documentation, including business development expenses ($60,000), severance pay for a short-term employee ($519), unpaid but accrued salaries ($7,498), unexplained credit card payments ($8,414), leave without pay ($67), and excess travel expenses ($62).

j. Reclassification of cost items for employee leave, educational expenses, labor costs, travel costs and other items. (AF Tabs 1 and 3T; Complaint; Answer.)

6. The MATCH Chairman was specified as "Key Personnel" in MATCH's contract proposal and in paragraph 37 of the provisions of Contract No. HC-5621. He was listed as the Project Manager and his projected total hours of work on the contract was 480 hours. It was estimated in MATCH'S proposal that the major part of the contract work was to be done by James L. Jones, the Technical Director. (AF Tab 2B, page 19.)

7. Paragraph 27 of Contract No. HC-5621, entitled "Payment for Overtime Premiums," provides, in pertinent part as follows:

> (a) Allowable costs shall not include any amount on account of overtime premiums except when (1) specified in (d), below, or (2) paid for work:
>
> > (i) Necessary to cope with emergencies such as those resulting from accidents, natural disasters, breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature;
> >
> > * * * *
> >
> > (iv) Which will result in lower cost to the Government. (b) The cost of overtime premiums otherwise allowable under (a), above, shall be

> allowed only to the extent the amount thereof is reasonable and properly allocable to the work under the contract.
>
> (3) Reasons why the required work cannot be performed on the basis of utilizing multishift operations or by the employment of additional personnel; and
>
> (4) The extent to which approval of overtime would affect the performance of payments in connection with any other Government contracts, together with any identification of such affected contracts.
>
> (d) The contractor is authorized to perform overtime, in addition to that performed under (a) (2), only to the extent, if any, specified elsewhere in this contract. (AF Tab 2B.)

8. The number of hours listed as worked by the MATCH Chairman on the company time sheets were estimates rather than actual hours worked by him each day. The MATCH Chairman billed a substantial number of hours on Contract No. HC-5621 as overtime. MATCH did not request or obtain the prior approval of the contracting officer for the MATCH Chairman to bill any of his hours as overtime. The OIG auditors found that the MATCH Chairman did contribute some direct labor time to direct cost centers during contract performance, but that the auditors could not determine the amount of actual hours. (Answer; AF Tab 4B at p. 14-16.)

9. MATCH is a minority business participating in the Section 8(a) Program of the Small Business Administration. MATCH listed the donations to the Howard University Chapter of Phi Beta Kappa, the National Conference of Black Lawyers, and the TransAfrica Committee as business expenses under the contracts, on the theory that support for these organizations would give MATCH exposure in the black community and would increase its business potential. (AF Tabs 2A, 2B, 4B.)

10. MATCH had an "International Division" that had been functioning in the private sector in Nigeria for about ten years. No differentiation or allocation of time or resources was earmarked for the International Division in any of MATCH's claimed costs. (AF Tab 1, p. 4; Complaint, p. 7.)

11. MATCH provided a "modest Christmas and New Year's hospitality" of alcoholic beverages and pastries for company clients and employees, claiming that the purpose was for employee morale and not entertainment. (Complaint; AF Tab 3B, p. 8.)

12. MATCH paid cost of living and bonus payments to certain employees, claiming those payments were made in accordance with a company policy to reward performance above and beyond the specified requirements" of the job that had been "well established over the fifteen-year life of the corporation." Complaint; AF Tab 3B, p. 5.)

Discussion

The contractor bears the burden of proof to show that a claimed cost is proper. The contractor must support this claim by either documentation or specific contract terms. If the contractor fails to substantiate a cost for which the contract budget provides or which is allowable as a necessary or

proper cost of contract performance, the claim fails. Council of Jewish Manpower Associates. Inc., LBCA No. 81-BCA-14, 83-1 BCA 16,216.

The cost reclassifications and disallowances challenged by MATCH fall into the following six categories: Chairman's Labor Costs, International Division Costs, Overhead Pool Disallowance, Miscellaneous Costs, Christmas and New Year's Hospitality, and Bonus Reclassification. MATCH argues that reclassification of the MATCH Chairman's salary from direct costs and overhead to the G&A pool was arbitrary and inconsistent with the facts. It also contends that disallowance of all hours charged by the MATCH Chairman in excess of 2,080 hours per work year was arbitrary and capricious. MATCH contests the reclassification of all costs in the overhead and G&A pool for the International Division to unrecoverable direct costs because it contends those costs were related to Federal contracts, although incurred overseas. MATCH'S further claims that the disallowance of certain unspecified advertising and conference expenses was unreasonable, and that the disallowance of miscellaneous costs as unsupported by evidence was incorrect because those costs "can be justified in accordance with generally accepted auditing standards." (Notice of Appeal.)

Chairman's Labor Costs

MATCH asserts that the disallowance of 480 hours of direct costs for Contract No. HC-5621 was improper under the contract. The Government contends, however, that the disallowance was necessary because of the auditors' lack of confidence in the validity of the time sheets upon which MATCH based its labor cost claim. The OIG auditors acknowledged that the MATCH Chairman did, in fact, work some direct labor hours (F.F. No. 8). However, the contracting officer's final decision is based on an assumption that no direct labor was performed by the Chairman, which is erroneous. MATCH is entitled to compensation for those direct labor hours that can be reasonably ascertained from the record. Despite the fact that the time records for the MATCH Chairman were estimates, I can find nothing in the record to support a finding that his actual work hours on Contract No. HC-5621 were de minimis. Rather, he estimated that he spent many more hours than was contemplated by the parties in the contract. The contract was performed acceptably, presumably with the fully performed work hours of the MATCH Chairman as set out in the contract. Therefore, I conclude that the direct cost charge for the MATCH Chairman's 480 hours is allowed because (1) it was contemplated by the parties as specified in the Schedule of Key Personnel, and (2) it is reasonable, in the absence of any evidence to the contrary, to conclude that the work was, in fact, performed by him. See Washington State University, IBCA Nos. 1467-6-81 and 1469-6-81, 81-2 BCA 15,438. Nevertheless, the remaining hours attributed by MATCH to its Chairman were properly reclassified to G&A because supervisory labor costs are generally overhead costs and MATCH failed to provide credible evidence to support a finding that the additional hours were both performed and necessary under Paragraph 27 of the contract. The time sheets provided by MATCH were mere projections and indicated a repetitive time allocation which was insufficient to establish direct work on the contract beyond the 480 hours contemplated by the parties. These claimed costs are not allowable because they are not reasonable, allocable, or determinable, given the scant record in this case. FPR S 1-15.201-2 (1980).

MATCH also claims that the reclassification of the Chairman's hours in excess of 2080 hours was improper. However, not only did MATCH fail to provide reliable evidence of the actual hours worked by its Chairman on the contract, it also failed to establish the necessity for such overtime work or approval of it by the contracting officer as required by S Paragraph 27 of the contract.

Accordingly, MATCH's claim for direct costs for overtime hours that it contends were attributable to work by its Chairman is denied for lack of evidence to support it.

International Division Costs

MATCH contends that the reclassification of legal expenses, selling costs, and salary to the International Division cost pool was improper. The Government submits that the reclassification of these expenses was proper because these costs were unrelated to domestic Federal contracts and therefore had been improperly classified by MATCH. Although MATCH asserted that the Division was in "name only" and that all claimed costs were associated with MATCH's activities with government agencies, MATCH did not provide documentation to support this claim. MATCH failed to provide evidence that the International Division was related to and dependent upon domestic Federal contracts, or that costs incurred in the operation of MATCH's International Division were allocable to the present contracts. FPR S 1-15.201-2 (1980).

Expenses are allowable when they are required in the administration of a Government contract, but not if solely for the benefit of the contractor. Here, these costs were properly disallowed by the contracting officer because the Government received no benefit. The Housing Authority of the City of New Haven, HUD BCA No. 74-3, 78-2 BCA 13,237; FPR S 1-15.711-6 (1980). MATCH has failed to show that these costs were necessary to the overall operation of the business or that HUD's interests were enhanced by this international development. See FPR S 1-15.201-3; FPR S 1-15.201-4 (1980). In the absence of evidence of any benefit to the Government as a consequence of the expenditure of contract funds by MATCH in the operation of its International Division, I find that the reclassification was proper. Data Design Laboratories, ASBCA No. 27535, 85-3 BCA 18,400 (citing TRW Systems Group of TRW. Inc., ASBCA No. 11499, 68-2 BCA 7117).

MATCH also argues that it was justified in making an allocation of funds based on the Small Business Association ("SBA") policy requiring business development. The Government challenges MATCH's reliance on this SBA requirement because the business development requirement only extends to plan formation where there is a specific 8(a) contract associated with the costs. Where, as here, there is no such contract, the financing responsibility falls to the contractor. 13 C.F.R. S 124.1-4 (1983). Thus, I find that the legal expenses, selling costs, and salary paid by MATCH's International Division were expenses properly reclassified as International Division costs.

Overhead Pool Disallowances

MATCH claims that the $660 real estate tax penalty, $150 payment to Phi Beta Kappa of Howard University, and $750 payment S to the National Conference of Black Lawyers and TransAfrica Committee were improperly disallowed from the overhead pool. MATCH asserts that these costs are allowable as costs of recruiting minority workers. However, the Government contends that these payments are unallowable donations because the Government derived no benefit from these payments. The real estate tax penalty did not result from compliance with any provisions of the contract or written instructions from the contracting officer and cannot be charged to the contract. FPR S 1-15.205-13 (1980). MATCH's donations of $900 were correctly classified as unallowable donations under FPR S 1-15.205-8 (1980) because there is no tangible benefit accruing to MATCH or the Government which would warrant charging these donations to the contract. See Lockheed - Georgia Company. A Division of Lockheed, ASBCA No.

27660, 90-3 BCA 22,957; General Dynamics, ASBCA No. 6811, 61-1 BCA 3086. In The Boeing ComDany, ASBCA No. 14370, 73-2 BCA 10,325, where the contractor evidenced participation and beneficial interaction between the source of the donation and the company, the costs were properly allowed. The present record does not support a finding of allowable recruiting costs because no specific recruiting program or actual recruitment was demonstrated by MATCH. FPR S 1-15.205-33 (1980).

In light of MATCH's lack of proof that these expenditures were permissible under the terms of the contract and because MATCH has offered no evidence that the contracting officer's decision was arbitrary or capricious, I find that these costs were properly disallowed.

Miscellaneous Costs

I find that the following costs were properly denied by the contracting officer because MATCH has failed to carry its burden of proof to substantiate its claims in any way, or to show that the contracting officer's decision was incorrect as a matter of law: business development ($60,000), severance pay ($519), accrued but unpaid salary ($7,498), American Express ($8,414), leave without pay ($67), and travel cost excesses ($62). For the same reason, I find that the following cost reclassifications were proper: employee leave, educational expenses, labor costs, travel, drape expense, commission and auto repair. See Council of Jewish ManPower Associates. Inc., supra.

Christmas and New Year's Hospitality

MATCH contends that the $200 expenditure for holiday hospitality held for MATCH employees and clients is allowable as an employee morale cost. The Government submits that the contracting officer's disallowance of a $200 reimbursement for alcoholic beverages and pastries provided was proper because no documentation was submitted in the record to substantiate the claimed purpose of the parties or to explain why clients were invited to attend events whose purpose was to improve employee morale. I find that MATCH has failed to prove that the costs were for improving employee morale and were not simply for entertainment. FPR S 1-15.205-10 & 11 (1980). To be an allowable cost, it must be clearly documented that an event's purpose was to improve employee morale, that the event benefitted employees and not outside participants (such as spouses or other non-government clients), and that the costs were reasonable. See Cotton & Co., EBCA No. 426-6-89, 90-2 BCA 22,828 (Employee morale expenses were allowable where contractor held three birthday luncheons for employees and demonstrated the purpose was for employee morale); Lockheed - Georgia Company. A Division of Lockheed, supra, at 115,286. MATCH characterized its holiday receptions as "hospitality" for employees and company clients, which indicates that the purpose of the events was primarily entertainment. The record fails to establish that the company clients who attended were HUD personnel, and not private sector clients for whom the expense would be unallowable. Therefore, I find that the claim fails even though alcohol was an allowable cost prior to the adoption of a regulation prohibiting reimbursement for such an expenditure of Federal funds. See FAR 31.205-51 (1986).

Bonus Reclassification

MATCH contends that the reclassification of cost-of-living S and bonus Payments to direct cost centers was improper. The Government, on the other hand, maintains that these payments were not uniformly and consistently applied

and, thus, are not allowed to be classified as cost of living and bonus payments. Under FPR S 1-15.205-6 (1980), these payments are allowable only when required by law, an employer/employee agreement, or an established policy. MATCH did not provide any supporting documentation which would establish its entitlement to reimbursement for these payments, other than a general statement of its policy, and it only avers that this policy had been "well- established." Accordingly, in the absence of sufficient evidence to establish MATCH's claim, I find that the reclassification was proper.

Conclusion

For the foregoing reasons, all of MATCH's cost claims are denied except for its claim for 480 hours of the MATCH Chairman's direct labor costs, which I find to have been improperly reclassified by the contracting officer as a G&A expense. The contracting officer shall reclassify those 480 hours as direct labor costs and shall credit these costs against amounts due from MATCH. This case is remanded to the contracting officer for further action consistent with this decision.

Jean S. Cooper
Administrative Judge

Concur:

David T. Anderson
Administrative Judge